



### FINDINGS OF FACT

Claimant alleges personal injury by accident on April 30, 2006. Her counsel filed an Application for Hearing with the Division on November 21, 2006. On December 11, 2007, the ALJ entered an order appointing Dr. Pat Do to perform a neutral medical evaluation. Dr. Do examined claimant on March 6, 2008, and provided the ALJ and both counsel with a narrative report bearing the same date. A preliminary hearing was held on April 8, 2008. A preliminary hearing order was entered on April 8, 2008, which awarded claimant temporary total disability benefits and medical treatment with Dr. Do.

On September 25, 2008, another preliminary order was entered, apparently without a hearing, in which claimant's authorized physician was changed from Dr. Do to Dr. David Hufford. No issue of compensability was raised at the April 8, 2008, preliminary hearing. No party requested Board review of the order appointing Dr. Do as neutral examining physician or the two preliminary hearing orders.

On December 9, 2011, respondent filed a motion with the ALJ to dismiss the claim pursuant to K.S.A. 44-523(f). There was a hearing on the motion to dismiss on December 29, 2011. Claimant briefly testified at the motion hearing that she had continued to see Dr. Hufford approximately once every six months. At the conclusion of the hearing the ALJ stated on the record: "It's pretty clear that the lady's still undergoing active medical treatment by the authorized treating physician and the dismissal statute in question doesn't apply and the respondent's motion to dismiss is hereby denied."<sup>1</sup> On December 29, 2011, the ALJ entered a written Order denying respondent's motion to dismiss.

### PRINCIPLES OF LAW

Effective July 1, 2006, the Legislature imposed a five-year deadline on the prosecution of claims. That statutory amendment is embodied in K.S.A. 44-523(f), which provides:

(f) Any claim that has not proceeded to final hearing, a settlement hearing, or an agreed award under the workers compensation act within five years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, shall be dismissed by the administrative law judge for lack of prosecution. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the five year limitation provided for herein. This section shall not affect any future benefits which have been left open upon proper application by an award or settlement.

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<sup>1</sup> M.H. Trans. at 7.

### ANALYSIS

The Kansas Workers Compensation Board has jurisdiction to review decisions of administrative law judges only to the extent provided in the Act. The Board has jurisdiction to review preliminary hearing orders as to disputed issues of compensability as specifically set forth in K.S.A. 44-534a(a)(2). The Board also has jurisdiction to review preliminary hearing orders under K.S.A. 2010 Supp. 44-551(i)(2)(A) if it is alleged that the ALJ exceeded his or her jurisdiction in granting or denying the relief requested at the preliminary hearing. Pursuant to K.S.A. 2010 Supp. 44-551(i)(1), the Board is provided with jurisdiction to review final orders, awards, or modifications of awards entered by an administrative law judge. Such jurisdiction does not generally extend to interlocutory orders.

The Order of which respondent seeks review is not a preliminary hearing order. It is an order denying respondent's motion to dismiss the claim based on K.S.A. 44-523(f). The Order is not a final order.

Since the ALJ's order denying respondent's motion to dismiss is not a final order, but rather is interlocutory in nature, the Board lacks jurisdiction to review the merits of the issue raised by respondent.<sup>2</sup> When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.<sup>3</sup> Accordingly, respondent's application for Board review is dismissed.

### CONCLUSION

(1) The Board does not have jurisdiction at this point in the claim to review the ALJ's December 29, 2011, Order denying respondent's motion to dismiss.

(2) Respondent's request for Board review must accordingly be dismissed for lack of jurisdiction.

**WHEREFORE**, the Board hereby dismisses the respondent's application for Board review.

**IT IS SO ORDERED.**

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<sup>2</sup> *Pham v. Dold Foods, Inc.*, Nos. 1,013,951 & 1,013,952, 2011 WL 6122903 (Kan. WCAB Nov. 22, 2011).

<sup>3</sup> See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

Dated this \_\_\_\_ day of March, 2012.

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BOARD MEMBER

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c: John L. Carmichael, Attorney for Claimant  
John D. Jurcyk, Attorney for Respondent  
John D. Clark, Administrative Law Judge